IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 889 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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RAMESHBHAI KESHABHAI DANTANI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JB DASTOOR for Appellant(s) : 1,
MR PD BHATE, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/08/2007

ORAL JUDGMENT

1. The present appeal is preferred by the appellant-orig.accused no.2 (hereinafter referred to as 'the appellant') challenging the judgment and order of conviction and sentence dated 21st April 2006 passed by the learned Presiding Officer and Additional

Sessions Judge, Fast Track Court No.5, Gandhinagar at Kalol, in Sessions Case No.52 of 2005, whereby the learned trial Judge has convicted the present appellant for the offence punishable under Section 366 read with Section 114 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5000/-, in default of making payment of fine, he is ordered to undergo simple imprisonment for six months. The learned trial Judge has also convicted the present appellant for the offence punishable under Section 363 read with Section 114 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs. 3000/- and in default of making payment of fine, he is ordered to undergo simple imprisonment for three months. The learned trial Judge has also ordered to run both the sentences concurrently. However, the learned trial Judge has given benefit of doubt to the present appellant so far as the offence

punishable under Section 376 of the Indian Penal Code is concerned and thereby, has acquitted the present appellant from the charge of offence punishable under Section 376 read with Section 114 of the Indian Penal Code. It is submitted that the appellant at present is in jail.

2. Shri J.B. Dastoor, learned counsel appearing for the appellant, has taken this Court through the charge framed by the learned trial Judge and has submitted that as such there was no allegation against the present appellant of having committed any rape on the victim-girl, even then the appellant was asked to face the trial for the offence punishable under Section 376 of the Indian Penal Code. Shri P.D. Bhate, learned Additional Public Prosecutor, has expressed his disagreement to the said submissions and has submitted that normally the Court should frame separate charge for each offence committed by each individual accused person. But in the present case, the

language of the charge framed creates confusion and it also indicates that the appellant was also a person responsible for commission of rape under Section 376 of the Indian Penal Code. But ultimately this defect in charge does not go to the legality and validity of the trial and suspension of mode of conviction. The appellant was very well aware that he is facing the charge of abetment for two major offences i.e. for the offence punishable under Sections 376 and 366 of the Indian Penal Code.

3. To appreciate the submissions made before the Court, it would be beneficial to state the basic facts which were placed by the prosecution before the learned trial Judge. It is alleged that on 18th April 2005 when the victim girl was alone at her residence and her parents had gone to attend one “Swadhyay Varg” and her old grandparents had gone to their bed, the appellant had come to the victim girl and told her that the orig.accused no.1-

Kantiji, who is standing backside her house, is calling her. It is also the say of the prosecution that when the appellant was asked a positive question by the victim girl, the appellant had shown his ignorance as to for what purpose the orig.accused no.1-Kantiji was calling her. The appellant herein-orig.accused no.2, orig.accused no.1-Kantiji and father of the victim girl were cultivating a large chunk of agricultural land as partners owned by one person. So the victim girl was in acquaintance with the appellant as well as the orig. accused no.1-Kantiji. She was also doing labour work. It is alleged that the victim girl had thought that the said orig.accused no.1-Kantiji must be calling her for some work related to the agricultural land which was being carried out by them or the orig.accused no.1-Kantiji might be taking her to some other place for labour work. So she accompanied the appellant and went with the appellant where the orig.accused no.1-Kantiji was standing. Thereafter, the orig.accused no.1-Kantiji had

left both of them and escaped from the said place. Thereafter, the victim was taken by orig.accused no.1-Kantiji at a distance of certain kilometres and she was confined in a hut erected near Vasaniya Mahadev in Gandinagar District. Two persons were there in the said hut but they had left the place conveniently. The victim girl could not identify them or at least name them as it was about 11-00 p.m. In that hut, the orig. accused no.1-Kantiji had done sexual intercourse with the victim girl against her wish and will, and thereby committed rape. The victim girl attempted to escape. She had also struggled to get out of the grip of the orig. accused no.1-Kantiji but she could not do anything and ultimately she was victimised by the sexual offence committed by the orig. accused no.1. On the next date of incident, she was given solace by the orig. accused no.1 that she will be sent back to her home and therefore, she was asked to board a tractor but on seeing one known person, she got down

from the said tractor and with the help of the said known person, who has been examined by the prosecution in the present case, reached her home and ultimately, on persuasion she unfolded the story of the wrong committed with her. The police thereafter arrested both the accused persons and on completion of the investigation chargesheeted both of them.

4. Shri J. B. Dastoor, learned counsel appearing for the appellant, has also taken this Court through the evidence of important witnesses namely the victim girl and has argued that the appellant was wrongly asked to face the trial for the offence punishable under Section 376 of the Indian Penal Code, as such the appellant was not knowing that the orig.accused no.1-Kantiji would commit rape on the victim girl and will molest on the chastity of the victim girl. Keeping in mind the oral as well as documentary evidence and relations inter-se, it is clear that there was no reason for the victim girl to implicate the

present appellant in such a serious offence if the present appellant was not a party in taking the victim girl out of the shelter of her parents and also out of her home when she was practically alone at her house. Thereafter, she was called out of her house at 09-00 p.m. After some deliberations and in absence of any material contradictions or improvements in the version of the victim girl, in response to the query raised by the Court, Shri J.B. Dastoor has fairly accepted that it is difficult for the appellant to convince the Court that the conviction recorded by the learned trial Judge is patently illegal or otherwise bad. On plain reading of the judgment and order under challenge, keeping in mind the documentary evidence as well as the oral evidence led by the prosecution during the course of trial, it is not possible for this Court to say that the conviction recorded is based on erroneous appreciation of evidence or the finding is based on mere surmises or conjectures. Shri

Dastoor, learned counsel appearing for the appellant, therefore, has not pressed the present appeal so far as the judgment and order of conviction recorded by the learned trial Judge is concerned.

5. The second fold of argument of Shri J.B. Dastoor, learned counsel appearing for the appellant, is that the learned trial Judge has imposed a very severe punishment to the appellant for no good reasons. The orig. accused no.1-Kantiji, the real wrong doer, has not preferred any appeal against the judgment and order of conviction and sentence passed by the learned trial Judge. He has been asked to undergo rigorous imprisonment for 10 years for the offence punishable under Section 376 of the Indian Penal Code. The circumstances show that there was no active participation of the appellant herein and the gravity of the act found proved by the learned trial Judge is not very serious. Ultimately, the victim girl at the relevant point of time was about to

complete 15 years of age. The appellant had not dragged the victim girl or no more persuasion was even made by the appellant. When it has emerged that the victim girl and the orig.accused no.1-Kantiji were knowing each other and they were working together, and they had also stayed together for some period in nearby areas, it is very likely that the victim girl may also be anxious to go with the orig.accused no.1-Kantiji even for agricultural work. So the gravity of offence adjudged by the learned trial Judge while imposing punishment appears to be much higher than required.

6. On careful reading of the FIR at Ex.37 and other evidence, it is clear that the birth date of victim girl is 01st May 1989 and the date of offence is 18th April 2005. The birth certificate is produced vide Ex.38 and the learned trial Judge has rightly appreciated this evidence while linking the accused with the offence punishable under Section 363 of

the Indian Penal Code. Undisputedly, the orig.accused no.1-Kantiji had not gone to the house of the victim girl. It emerges from record that the appellant was aged about 44 years at the relevant point of time. So considering the relation between the appellant and the father of the victim girl, she may have agreed to join the appellant herein. It is difficult for this Court to believe that the appellant was not knowing the intention or hidden purpose of inducing the victim girl to come out of the shelter of the guardianship of her parents; otherwise she would not have left her home at odd hours i.e. at about 09-00 p.m. It is true that the orig.accused no.1-Kantiji at the relevant point of time was a young man of 21 years and the victim girl was knowing the orig.accused no.1. But the act of present appellant leaving the spot after handing over the minor victim girl to the orig.accused no.1, is a guilty conduct. But it is rightly argued by Shri J.B. Dastoor that the appellant may be under impression that the victim girl

would also like to meet the orig.accused no.1 or she may not be aware that the orig.accused no.1 will molest on her chastity and commit rape on her. The offence of kidnapping completes on its commission. It is not a continuing offence. However, the conduct of orig.accused no.1 ought to have been looked into properly by the appellant, after all the Court has reason to believe that the appellant being a man of 44 years of age, was capable of understanding the pros and cons of his act and omissions. The appellant could have said the orig.accused no.1-Kantiji that as the orig.accused no.1 also knew the victim girl and her family members, it was not impossible for orig.accused no.1-Kantiji to go to the house of the victim girl and to ask her to accompany him. So the appellant had played some role in taking out the victim girl from the shelter of guardianship of her parents and he was also aware that orig.accused no.1-Kantiji was going to do something wrong to the victim girl. But ultimately, the act of

orig.accused no.1 was more grave because he is the person who took the victim girl who was just at the backside of her house when she met the orig.accused no.1, and in the same way, it is not the say of the victim girl that the appellant herein was responsible in pursuing her to accompany orig.accused no.1. She has stated that relying upon the appellant herein, she had followed the orig. accused no.1 for a pretty long distance on foot and proceeding in the direction of Vasaniya Mahadev temple.

7. So it was not possible for this Court to hold the present appellant guilty for the offence punishable under Sections 366 or 363 of the Indian Penal Code individually. Thus, two offences have been committed by the orig.accused no.1-Kantiji but the role played by the present appellant is a role of an abettor. True it is that the abettor is also equally responsible and can be punished in consequence of the abetment committed by him. The severity of the punishment can be qua the

punishment imposed upon the main accused. Section 114 of the Indian Penal Code inter alia provides that an abettor, “shall be deemed to have committed such act or offence”. But while imposing rigorous imprisonment for seven years for the offence punishable under Section 366 of the Indian Penal Code, the learned trial Judge ought to have considered the age of orig. accused no.1, the fact of acquaintance of orig.accused no.1-Kantiji with the victim girl, the relation of orig.accused no.1-Kantiji with the father of victim girl and the very limited role played by the appellant herein. The maximum punishment that could have been imposed would not be more than 10 years so the punishment of seven years appears to be very harsh punishment. So according to Shri J.B. Dastoor, the punishment should not be of more than two years and the same punishment could have been imposed for the offence punishable under Section 366 read with Section 114 of the Indian Penal Code. So far as the offence punishable under Section

363 read with 114 of the Indian Penal Code is concerned, the maximum punishment prescribed by the learned trial Judge is of five years. The fine is already imposed by the learned trial Judge. Basically the accused persons were doing agricultural labour work and because of poverty, the appellant has failed in paying the amount of fine. The socio-economic background of the victim girl and the appellant is always considered relevant while imposing punishment. The offence found to have been committed by the appellant is not heinous crime where the maximum punishment is required to be imposed.

8. Shri P.D. Bhate, learned Additional Public Prosecutor, submits that the punishment is on some higher side but it would not be proper for this Court to reduce the punishment than two years as submitted by Shri Dastoor. The appellant ought to have acted as a responsible citizen, especially when he was knowing the father of the victim girl. The parents of the

victim had gone to “Swadhyay Varg” on that day. “Swadhyay Varg” is a spiritual activity equated with 'Satsang' which is popularly known among the people following the Hindu religion and the appellant has taken disadvantage of the loneliness of the tender-aged girl who was about to complete her 15 years of age in a couple of days. Minimum three years punishment ought to have been imposed by the learned trial Judge. The appellant was not granted bail pending trial. No reduction is required to be made so far as the amount of fine imposed by the learned trial Judge is concerned. If the appellant herein fails in making payment of amount of fine, he shall have to undergo simple imprisonment but in such or similar cases, normally this Court and the Apex Court have imposed imprisonment for a period between two to three years, then any appropriate sentence may be passed. But it should not be only for two years, otherwise the element of deterrence would disappear. If the appellant fails in

making payment of amount of fine, he shall have to be in jail for about nine months for the same.

9. So keeping the totality in mind, this Court is of the view that without disturbing the judgment and order of conviction, the imprisonment is required to be reduced to 2½ years i.e. for 30 months for each offence punishable under Section 366 read with Section 114 of the Indian Penal Code as well as Section 363 read with Section 114 of the Indian Penal Code. No alteration is required to be made so far as the sentence of fine is concerned.

10. So in view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction dated 21th April 2006 passed by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court No.5, Gandhinagar at Kalol, in Sessions Case No.52 of 2005, is hereby upheld; and the judgment and order of sentence passed by the learned

trial Judge is hereby modified and reduced to the extent that instead of rigorous imprisonment for seven years for the offence punishable under Section 366 read with Section 114 of the Indian Penal Code, the appellant shall now undergo rigorous imprisonment for 2½ years (thirty months); and so far as the offence punishable under Section 363 read with Section 114 of the Indian Penal Code is concerned, the appellant shall undergo rigorous imprisonment for 2½ years (thirty months), instead of rigorous imprisonment for five years. The order of sentence qua fine remains unaltered so far as both the aforesaid offences are concerned.

11. The substantive sentences are ordered to run concurrently. The appellant shall be entitled to set off under the scheme of Section 428 of the Indian Penal Code.

(C.K. Buch, J)

Aakar